No. 14881

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE ANGEL OCON,

Appellant,

vs.

ALBERT DEL GUERCIO,
Acting Officer in Charge
of the Immigration and
Naturalization Service,
Los Angeles, California,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

IRWIN GOSTIN
6305 Yucca Street
Hollywood 28, California

HOllywood 2-5280

Attorney for Appellant.

No. 14881

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE ANGEL OCON,

Appellant,

vs.

ALBERT DEL GUERCIO,
Acting Officer in Charge
of the Immigration and
Naturalization Service,
Los Angeles, California,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

IRWIN GOSTIN
6305 Yucca Street
Hollywood 28, California

HOllywood 2-5280

Attorney for Appellant.

TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes

Texts

NO. 14881

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE ANGEL OCON,

Appellant,

vs.

ALBERT DEL GUERCIO,
Acting Officer in Charge
of the Immigration and
Naturalization Service,
Los Angeles, California,

Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a Judgment of the District Court in favor of defendant. (Tr. of Rec., P. 28) Jurisdiction below arose under Section 10 of the Administrative Procedure Act, 5 U. S. Code Sec. 1009. Jurisdiction of this court is conferred by 28 U. S. Code Sec. 1291.

STATEMENT OF THE CASE

Appellant is a native and citizen of Mexico who legally ıtered this Country in 1919 and has remained in the United ates continually since that time. On September 1, 1953, a arrant of arrest was issued by the District Director of the ımigration and Naturalization Service charging that appellant as subject to deportation under the Immigration and ationality Act of 1952 because appellant had been a member the Communist Party after entry into the United States. id warrant of arrest was served on October 14, 1953, and arings on the charge were begun on October 17, 1953.

At the deportation hearing appellant objected to being vorn as a witness prior to the introduction of the evidence the Immigration Service. (S. R. 6) When appellant's unsel was asked whether or not he also advised the pellant not to testify in the proceedings, appellant's torney answered "I do so, Mr. Special Inquiry Officer, this time. I will reserve further advice until after I ar the evidence that the Government has to introduce." . R. 6) Appellant also objected to the deportation hearing the grounds that the statute under which the hearings were ing conducted violated the First Amendment, the Fifth, nth and Tenth Amendments to the Constitution as well as e prohibition against ex post facto legislation and bills of tainder (S. R. 7, 8). Two Government witnesses testified

at the hearing that the appellant was a member of the Communist Party; each testified as to different periods of time. Neither corroborated the testimony of the other, nor were documents of Communist Party membership introduced to support the testimony of either witness. Motions were made to strike the testimony of the witnesses and to dismiss the proceedings, but said motions were denied. (S. R. 100 & 101)

The Special Inquiry Officer, in a decision dated December 17, 1953, found that there was reasonable, substantial and probative evidence to support the finding that appellant was a member of the Communist Party from 1939 to 1942 and during part of 1949 and 1950 and ordered the deportation of appellant. The Board of Immigration Appeals, in a decision dated June 16, 1954, dismissed appellant's appeal, stating that the testimony of the two witnesses constituted "probative, reasonable, relevant and substantial evidence establishing the respondent's membership in the Communist Party of the United States." The Board of Immigration Appeals further agreed with the Special Inquiry Officer that the finding of the Special Inquiry Officer was "buttressed by the respondent's refusal to testify, on the grounds that where, as here, there was a duty to speak, silence is evidence of a most persuasive character".

On July 28, 1954, appellant filed a complaint in the

court below for an injunction preventing the Immigration and Naturalization Service from deporting him and requesting a declaratory judgment that the order for deportation was void and of no effect on the grounds that the deportation proceedings were not supported by reasonable, substantive and probative evidence and based upon incompetent evidence, that the order was entered without observance of due process and that the Administrative Procedure Act was violated, and that the Immigration and Nationality Act of 1952 was void on its face and as applied because it was in contravention of the First, Fifth, Ninth and Tenth amendments of the United States Constitution and because it constituted ex post facto legislation and a bill of attainder.

SPECIFICATION OF ERRORS

(1) Finding of Fact IX (Tr. of Rec. P. 32) is erroneous in that the only evidence to support the order of deportation is based upon testimony which is incompetent and which was hearsay and which was not the best evidence and which was coupled with the fact that an inference wrongfully was drawn from appellant's refusal to testify at the deportation proceedings when the burden of proof in said proceedings was on the Immigration and Naturalization Service. Said evidence was not reasonable, substantial, and probative.

(2) Finding of Fact VIII (Tr. of Rec. P. 32) is erroneous in that the Special Inquiry Officer had no jurisdiction because he was not appointed, qualified or assigned pursuant to Section 11 of the Administrative Procedure Act. Finding of Fact VI, Tr. of Rec. P. 32.)

(3) Finding of Fact X (Tr. of Rec. P. 32) is erroneous in that the Immigration and Nationality Act of 1952 is void on its face and as applied because it violates the First, Fifth, Ninth and Tenth Amendments of the United States Constitution and in the instant case constitutes ex post facto legislation, and is a bill of attainder.

SUMMARY OF ARGUMENT

The testimony of the two witnesses falls short of constituting reasonable, substantial and probative evidence as required by statute and the finding that appellant was a member of the Communist Party rests in part upon an inference wrongfully drawn from his silence at the deportation proceedings. No documentary evidence was introduced to support the charge and when the record is viewed as a whole, there is insufficient evidence to support the finding of Communist Party membership.

Appellant was entitled to a hearing before an officer appointed, qualified and assigned under the terms of the Administrative Procedure Act as well as to other procedural

guaranties provided by that Act.

Finally, the statute involved on its face and as applied denied appellant procedural and substantive due process of law, and is an ex post facto law and a bill of attainder as well as limiting appellant's rights to speech and association contrary to the First and Fifth Amendments.

ARGUMENT

1. THE FINDING THAT APPELLANT IS SUBJECT TO DEPORTATION BECAUSE HE WAS A MEMBER OF THE COMMUNIST PARTY IS NOT SUPPORTED BY REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE AS REQUIRED BY THE 1952 IMMIGRATION AND NATIONALITY ACT.

(A) STANDARD OF PROOF REQUIRED.

Section 242 (b) (4) of the Immigration and Nationality Act provides that "no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence". Although Section 10(e) of the Administrative Procedure Act provides for a similar standard of proof, this standard is new in deportation statutes and was incorporated for the first time in the Immigration and Nationality

Act of 1952.

The phrase "substantial evidence" has been defined as "more than a mere scintilla". It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Consolidated Edison Company vs. N. L. R. B., 305 U. S. 197, 229. The evidence "must do more than create a suspicion of the existence of the fact to be established . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury". N. L. R. B. vs. Columbian Enameling and Stamping Company, 306 U. S. 292, 300.

When faced with similar language concerning the standard of proof regarding cases before the National Labor Relations Board, the Supreme Court clarified the nature of the standard of proof required and the burden placed upon reviewing courts.

"It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rule assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the federal judiciary . . . Congress has left no room for

oubt as to the kind of scrutiny which a court of appeals nust give the record before the Board to satisfy itself that ne Board's order rests on adequate proof." Universal Camera Corporation vs. N. L. R. B., 340 U. S. 474, 487.

(B) EVIDENCE INTRODUCED.

The finding of fact that the appellant voluntarily was member of the Communist Party of the United States from 939 to 1942 and during part of 1949 and 1950 rests upon the estimony of the two Government informants who testified s to different periods of time of the alleged membership.

The first witness, Louis Rosser, testified that he ad been present at four meetings attended by the appellant rom 1939 to 1942, which meetings Rosser stated were Communist meetings. When asked whether or not he had ersonally called these meetings or invited persons to ttend them, Rosser stated that he did neither of these hings. (S. R. 23, 66-76, 80 and 88.)

Rosser further testified that he and the appellant worked together in the unemployed movement on demonstra- ions, grievance committees, delegations to the relief eadquarters of the State, of the County, we went to all ypes of sections of the County, Belvedere, Inglewood, roblems and so the only thing I saw him doing was working laily in the unemployed movement . . .". (S. R. 28) Rosser

further stated that he knew the plaintiff as a Communist from their day to day work in the Workers Alliance but on cross examination (S. R. 66, 68), he testified that many non-Communists were members and active in the Workers Alliance. He also said that many meetings attended by non-Communists were held at the Workers Alliance headquarters where Communist Party meetings which the appellant allegedly attended, were held. And when asked whether or not any of the people Rosser termed Communist co-workers in the Workers Alliance ever told him that they were members of the Communist Party his answer was "No" (S. R. P. 68).

Rosser admitted that when applying for admission to U. C. L. A. he had stated that he had formerly attended Phoenix J. C. (S. R. 45), but he also testified that other than attendance at U. C. L. A. and Sacramento J. C. in 1925 he had no further education since leaving high school (S. R. 44). Further contradictions concerning Rosser's educational background are contained in the record (S. R. 34-54) as well as an admission that while in attendance at U. C. L. A. Rosser agreed to have others take his examinations for him. (S. R. 95) Further, Rosser testified to a series of arrests and convictions for various charges involving moral turpitude (S. R. 91, 92).

No corroborating evidence of any kind was offered to support the testimony of Rosser nor were any documents

indicating Communist Party membership of the appellant introduced at the deportation hearing. Appellant moved to strike the testimony of Rosser as to appellant's membership in the Communist Party and attendance at Communist Party meetings on the grounds that the testimony was not the best evidence as to Communist Party membership and was hearsay but said motion was denied. (S. R. 100). Appellant further moved to strike Rosser's testimony entirely as being incompetent and of no probative value but said motion also was denied (S. R. 101).

The second and last witness who testified that appellant was a member of the Communist Party was Daniel Scarletto who stated that he had attended Communist Party meetings with the appellant. But Scarletto's testimony also was replete with contradictions. He first testified that the appellant was "present at several meetings I attended" (S. R. 106). But later Scarletto testified that appellant was present at "fifteen or twenty that I can remember" (S. R. 107). Further, Scarletto testified that he collected Communist Party dues from the appellant on "four or five occasions" (S. R. 107) but later testified when asked on cross examination on how many different occasions did Mr. Ocon pay dues to him, "Oh, I would say about ten different occasions" (S. R. 127). And again, when asked whether or not he was incorrect when he previously stated that he collected dues on four or five occasions, Scarletto

answered "I might have got that a little mixed up there, we wrangled it back and forth, but it was on several occasions" (S. R. 128).

Scarletto's testimony contains other instances of disregard for the truth. He had testified that he went into the Communist Party at the suggestion of an FBI agent. He was asked whether or not he knew the agent before 1947 and stated "No" (S. R. 114). When then asked whether or not the agent sought him out, Scarletto's answer was "Oh, I knew him before '47. I knew him in '46" (S. R. 114). Scarletto also testified that he was employed by Lockheed Aircraft Corporation during the course of his membership in the Communist Party and indicated on his employment application that he was not a Communist (S. R. 112). Further, when asked whether or not at the time of his recruitment to the Communist Party he truthfully answered a question as to whether or not he knew any FBI agents, Scarletto stated "Well, that would be kind of stupid, wouldn't it?" (S. R. 117).

At the conclusion of Scarletto's testimony, appellant moved to dismiss the proceedings because the entire evidence offered by the Immigration Service was incompetent but said motion was denied (S. R. 136).

Although both witnesses testified that appellant had attended "Communist meetings", the first witness admitted that he personally had no part in the calling of

hese meetings or inviting persons to attend them and it is herefore obvious that he had no personal knowledge that hese meetings were in fact restricted solely to members of the Communist Party. Nor is there any testimony in the record that the second witness called any meetings or nvited persons to attend the alleged Communist Party neetings that he stated appellant attended. The value of his type of testimony was considered by the court in Bridges vs. United States, 199 Fed (2d) 811, where at age 836 it was stated:

> "It is true that a number of witnesses described some of these meetings which Bridges attended, and at some of which he presided, as 'closed' Communist meetings. The logical fallacy in concluding from this that Bridges must therefore have been a Party member is that it assumes the truth of that which is sought to be proven. If, in fact, Bridges was not a Party member, his presence at such a meeting would mean no more than that he attended a meeting at which every other person present was a Party member."

It is apparent therefore that in the instant case, if he testimony of the two government informants were to be elieved in their entirety, the most that is contained in the

record is that the appellant attended certain meetings at which all others present other than the appellant were Communists. Such evidence cannot be said to be "reasonable, substantial and probative" and is certainly no more than a scintilla. "Such evidence, although inconclusive and insufficient in itself, is relevant to the issue of Party membership." Acosta vs. Landon, 125 Fed. Supp. 434, 438. (Emphasis added.)

Since neither government informant testified as to the same period of time, the testimony of one did not corroborate the testimony of the other in any way. Nor was a documentary evidence of any kind offered at the hearing to substantiate the charge that appellant was a member of the Communist Party. The only evidence presented was the testimony of the two informants.

The record reveals that both government witnesses were being paid for their services as witnesses. "When the amount of his pay depends upon the discoveries he is able to make, then that man becomes a dangerous instrument." Sopwith vs. Sopwith, 4 S. W. and T. R. 243, 247, 164 Eng. Rep. 1509. It is established law that the testimony of paid professional witnesses should be received with great caution and reserve. District of Columbia vs. Clawans, 300 U. S. 617; Allen vs. Allen, 285 Fed 962, Moller vs. Moller, 115 N. Y. 466.

As was stated in Fletcher vs. United States, 158

Fed (2d) 321 at Page 322:

"Granting that the credibility of the testimony of a paid informer is for the jury to decide, it nevertheless follows that where the entire case depends upon his testimony, the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witnesses' own interest. Here, admittedly, the usefulness -- and for which he received payment from the agent -- depended wholly upon his ability to make out a case. No other motive other than his own advantage impelled him in all that he did. And when to this is added the well recognized fact that a drug addict is inherently a purjurer where his own interests are concerned, it is manifest either that some corroboration of his testimony be required, or at least that it should be received with suspicion and acted upon with caution. The rule in this jurisdiction for a quarter of a century has been to require that a jury be warned in the case of evidence given by a detective engaged in the business of spying for hire."

Nor should the rule of law be any different because one of the informant witnesses became a member of the Communist Party at the suggestion of the FBI. "I cannot adopt the contention that Government spies are any more trustworthy, or less disposed to make trouble in order to profit therefrom, than are spies in private industry. Except in time of war, when a Nathan Hale may be a spy, spies are always necessarily drawn from the unwholesome and untrustworthy classes. A right minded man refuses such a job." Colver vs. Skeffington, 265 Fed 17, 69.

The record further reveals that Rosser had been convicted of crimes involving moral turpitude, could not testify in any detail whatever concerning his own personal background, although his testimony is detailed concerning alleged attendance at meetings of the appellant, and admitted falsification of school records, as well as admitting having had examinations at a university taken in his name by another. The witness Scarletto, as the evidence showed, was extremely loose with the truth, on one occasion stating that he had collected dues from the appellant on "four or five occasions", at another stating that he had collected dues "about ten times", and at a third time stating that he had collected dues "at least several times". This witness also admitted answering falsely a questionnaire for employment concerning his own membership in the Communist Party. Although reviewing courts do not

review all the facts de novo, the substantial evidence rule applies to the evidence when reviewed from the entire record. Universal Camera Corporation vs. N. L. R. B., 340 U. S. 474, and the courts can review all the facts, even the issue of credibility. N. L. R. B. vs. Universal Camera Corporation, 190 Fed (2d) 429. It has also been held that it is the major responsibility of the courts to review the evidence. N. L. R. B. vs. Pittsburgh Steamship Company, 340 U. S. 498. The Special Inquiry Officer's findings are entitled to respect but they must nevertheless be set aside when the record clearly precludes the Special Inquiry Officer's decision from being justified by a fair estimate of the worth of the testimony of witnesses. Universal Camera Corporation vs. N. L. R. B., 340 U. S. 474, 490.

Both government witnesses admitted the telling of falsehoods; one testified in great detail concerning the appellant but could supply no similar details concerning his own personal life; the other made contradictory statements concerning the alleged payment of dues by appellant; neither witness corroborated the testimony of the other in any degree; the testimony of neither was substantiated by documentary evidence of any kind; both testified to appellant's attendance at alleged Communist Party meetings but there is a "logical fallacy" in concluding that appellant must have been a Party member from this testimony and such testimony is "inconclusive and

nsufficient in itself". Both witnesses were paid informers nd the testimony of such witnesses should be scrutinized closely for the purpose of determining whether it is olored in such a way as to place guilt upon a defendant n furtherance of the witnesses' own interest". It cannot e stated that the record contains more than a mere cintilla of evidence concerning appellant's alleged Communist Party membership and that such evidence alls far short of being "reasonable, substantial and robative" evidence.

2. THE ADMINISTRATIVE ORDER OF DEPORTATION RESTS UPON AN UNSOUND LEGAL PREMISE, DRAWING AN INFERENCE OF GUILT FROM APPELLANT'S SILENCE AT THE DEPORTATION HEARING, AND MUST BE REVERSED EVEN THOUGH THE DEPORTATION ORDER COULD HAVE RESTED ON VALID PREMISES.

The decisions of the Special Inquiry Officer, and of the Board of Immigration Appeals in dismissing appellant's appeal, relied in part on appellant's silence at the deportation hearing. Thus it is stated on page 1 of the Opinion of the Board of Immigration Appeals that

the finding of prior membership in the Communist Party "is based on the testimony of two government witnesses and the alien's own refusal to testify in the course of the deportation proceedings, on advice of counsel". The Opinion continues on page 2: "He [the Special Inquiry Officer] also found it buttressed by the respondant's failure to testify, on the grounds that where, as here, there was a duty to speak, silence is evidence of a most persuasive character".

Previous court decisions have held that it is permissible to draw inferences from silence in deportation cases, but these same decisions considered that the scope of judicial review was limited to a determination of whether or not the hearing was fair. United States ex rel Bilokumsky vs. Tod, 263 U. S. 149; United States ex rel Vajtauer vs. Commissioner of Immigration, 273 U. S. 103. This was because prior to the passage of the 1952 Immigration and Nationality Act, the validity of deportation orders could be reviewed only by proceedings in habeas corpus. Heikkila vs. Barber, 345 U. S. 229. Therefore, the scope of review was limited to determining whether or not the alien had obtained a fair hearing. The language of the 1952 Immigration Act, however, requires that deportation orders be based upon reasonable, substantial and probative evidence and therefore the courts are no longer limited in determining only whether or not the hearing accorded the non-citizen

was fair but must also determine whether or not the evidence produced meets the statutory requirement. The older cases which allowed inferences to be drawn from silence did so from the point of view of determining merely whether or not the hearing accorded was a fair one, but they did not determine whether or not the record contained reasonable, substantial and probative evidence to support the deportation order.

Moreover, even when an inference from silence was drawn, it was drawn only when the court held that there was a duty upon the defendant to speak. Thus in the case of United States ex rel Vajtauer vs. Commissioner of Immigration, 273 U. S. 103, the court states as follows at page 111:

> "Attention is directed to the fact that the refusal to testify was based upon the supposed right of the witness not to be called upon to testify until all the evidence in support of the warrant was presented, and it is said that if silence is induced by a person's 'doubts of his rights or by a belief that his security will be best promoted by his silence, then no inference of assent can be drawn from that silence.' Citing Conn. vs. Kenny, 12 NETC 235, 237; People vs. Pfanschmidt, 262 Ill 411, 499.

But these cases merely apply the rule that no inference may be drawn from silence when there is no duty to speak, a rule which is not applicable where the witness is sworn and under a legal duty to give testimony which is not privileged." (Emphasis added.)

In the Vajtauer case, the alien was sworn in the proceedings and the court drew an inference from his silence, but recognized the principle that no inference from silence should be drawn when the person was not sworn and there was no duty to speak. The appellant in the instant case was not sworn and did not testify on the grounds that the burden was on the Immigration and Naturalization Service to prove its case by reasonable, substantial and probative evidence without the testimony of appellant. (Tr. of Rec., P. 6.) No duty to speak was therefore upon appellant.

In the case of United States ex rel Bilokumsky vs. Tod, 263 U. S. 149, the alien stood mute as to the issue of alienage and alienage was inferred from his silence. However, the court stated in that case at page 154: "Since alienage is not an element of the crime of sedition, testifying concerning his status could not have had a tendency to incriminate him". The Supreme Court thereby recognized a further exception to the rule that guilt can be inferred from silence by implying that no inference could

be drawn from silence when the testimony called for could be incriminating. There can be no question that the testimony called for in the instant case could be incriminating.

Further, the very phrase that "silence is evidence when there is a duty to speak" assumes that there is a duty upon the alien to speak in deportation proceedings when in truth and in fact the burden of proving the grounds for deportation rests upon the Immigration and Naturalization Service and not upon the alien. U. S. ex rel Belfrage vs. Shaughnessy, 113 Fed Supp. 56.

However, whatever the rule may have been concerning the permissibility in certain instances of an inference from silence in a limited review afforded by habeas corpus proceedings, it cannot be said that in face of the new standard of review imposed by the statute applicable here that silence of the appellant is an item of reasonable, substantial and probative evidence. Even under the old standard courts did not consider a failure to testify to be anything more that supporting evidence of a case already made out by other evidence. In United States vs. Reimer, 79 Fed (2d) 315, the court stated at page 317:

"While the relator's refusal to answer as to his belief in the overthrow of organized government may have some evidential force . . . it is no more than a scintilla

n the setting here. We have not yet reached the point where proof of one's belief can rest solely upon his refusal o answer questions concerning it." And it is clear that when the silence is occasioned by questions which could be ncriminating, such silence is not evidence.

"But whatever the underlying motivation, an invocation of the Fifth Amendment is no ground at all for an inference of guilt or of criminal proclivities. The privilege created by the amendment 'is for the innocent as well as the guilty' and no inference can be drawn against the person claiming it that he fears that he is 'engaging in doing something forbidden by Federal law'. Spector vs. United States, 9 Cir. 193 Fed (2d) 1002 at Page 1006. Wigmore on Evidence, 3rd Ed., Vol. VIII, Section 2251. For the history of the constitutional privilege see Judge Frank's dissenting opinion in U. S. vs. St. Pierre, 2 Cir., 132 Fed (2d) 837, 842, 147 A. L. R. 240. And since an invocation of the amendment made on legally sufficient grounds does not give rise to an inference of substantive criminality, of course an invocation made upon insufficient grounds may not serve as a basis for such inference.

At most, an improper refusal to testify, if persisted in -- as seems not to have been the case here -- might constitute grounds for conviction of criminal contempt."

United States ex rel Belfrage vs. Shaughnessy, 212 Fed (2d) 128, 130. And see Blau vs. U. S., 340 U. S. 159; Emspak vs. U. S., 349 U. S. 190.

Whatever inference may have been allowed under a limited review in habeas corpus proceedings, under the new standard of review the silence of an alien at his deportation hearing should not be construed as supplying a gap in the proof. United States vs. Holton, 222 Fed. (2d) 340.

The decisions of the Special Inquiry Officer and the Board of Immigration Appeals rest upon an unsound legal premise, that of drawing an inference from appellant's silence, although the statute requires that findings be based upon reasonable, substantial and probative evidence. Under such a statute there was no justification in placing any reliance upon appellant's silence. Since the order of deportation was based upon an unsound legal premise, it must, for that reason alone, be remanded for further administrative determination. See N. L. R. B. vs. Virginia Electric & Power Company, 314 U. S. 469; S. E. C. vs. Chenery Corporation, 318 U. S. 80; Federal Power

Commission vs. Idaho Power Company, 344 U. S. 17, 20.

3. APPELLANT WAS DENIED A HEARING BEFORE AN OFFICER APPOINTED, QUALIFIED AND ASSIGNED PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT AND WAS DENIED A FAIR HEARING PURSUANT TO THE TERMS OF SAID ACT.

The court below found that the Special Inquiry Officer who presided at the deportation hearing was not appointed, qualified or assigned pursuant to the provisions of Section 11 of the Administrative Procedure Act (Finding of fact VI, Tr. of Rec., P. 32) and that the Special Inquiry Officer was subject at all times to the supervision and control of the Attorney General (Finding of fact VII, Tr. of Rec., P. 32).

Appellant contends that he was entitled to a hearing based upon the terms of the Administrative Procedure Act and was entitled to have presiding at that hearing a Special Inquiry Officer appointed, qualified and assigned pursuant to that Act. Marcello vs. Bonds, 349 U. S. 302, held that under the terms of the 1952 Act deportation proceedings were exempt from the hearing provisions of the Administrative Procedure Act. But that case did not decide nor even consider the applicability of Section 11 of

he Administrative Procedure Act concerning the appointment, qualification and assignment of hearing officers. "The issue here presented is whether the Congress reversed itself in the 1952 Immigration Act and, in effect, reinstated he Sung case by making the hearing provisions of the Administrative Procedure Act directly applicable to deportation proceedings." Marcello vs. Bonds, 349 U.S. 302, 305.

The opinion of Mr. Justice Clark in the Marcello case rests upon the proposition that the language appearing n Section 242 (b) of the 1952 Immigration Act stating that "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section" was sufficiently explicit to overcome the wording of Section 12 of the Administrative Procedure Act that "no subsequent legislation shall be held o supersede or modify the provisions of this Chapter except to the extent that such legislation shall do so expressly". But there is no unanimity to this point of view. As was pointed out by Mr. Justice Black at page 316:

> "Both the Procedure Act and the 1952 Immigration Act were sponsored by Senator McCarran and Representative Walter. Their original proposals which finally evolved into the 1952 Act did expressly provide that the Procedure Act should not control proceedings

under the Immigration Act. The provision was that 'Notwithstanding any other law, including the Act of June 11, 1946, [the Administrative Procedure Act] the proceedings so prescribed shall be the sole and exclusive procedure for the deportability of an alien who is in the United States' (foot note). Hearings on these proposals brought strong protests from some organizations, including the American Bar Association, against the provision making the Administrative Procedure Act inapplicable to deportation proceedings (foot note). Afterwards the sponsors of the Immigration measures introduced new bills which significantly omitted from that provision the words 'Notwithstanding any other law, including the Act of June 11, 1946 [the Administrative Procedure Act]'. Consequently when the bill finally passed, there was no language which 'expressly' superseded or modified the binding requirement of Section 5 (c) of the Administrative Procedure Act."

And it may further be pointed out that on previous occasions when Congress has seen fit to exempt an agency

'rom the terms of the Administrative Procedure Act, it has ılways done so clearly and expressly. For example, Chapter III of the Supplemental Appropriation Act of 1951, Act of September 27, 1950, 64 Stat. 1044, 1048, stated: 'Proceedings under law relating to the exclusion or ex- ɔulsion of aliens shall hereafter be without regard to the ɔrovisions of Sections 5, 7 and 8 of the Administrative Procedure Act (5 U. S. C. 1004, 1006, 1007)." Similarly worded statutes have been passed in regard to agencies dealing with problems other than that of Immigration. Thus, Section 16 of the Rubber Act of 1948, 62 Stat. 108, 50 U. S. C. A. App. Section 1935 (Supp.) 1952, states: 'Functions exercised under this Act shall be excluded 'rom the operation of the Administrative Procedure Act except as to the requirements of Sections 3 and 10 thereof." Section 5 of the Second Decontrol Act of 1947, 61 Stat. 323, 50 U. S. C. A. App. 1900, provided that: "The functions exercised under Title III of the Second War Powers Act, 1942, as amended (including the amendments to existing law made by such Title), and the functions exercised under Section VI of such Act of July 2, 1940, as amended, shall be excluded from the operations of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of Sections 3 and 10 thereof." Also, Section 7 of the Export Controls Act of 1949, 63 Stat. 9, 50 U. S. C. A. App. 2027, provided that: "The functions exercised under this

Act shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237), except as to the requirements of Section III thereof."

An additional form of the clear and express exemption or exclusion from the terms of the Administrative Procedure Act used by Congress was to amend Section 3(a) of the Administrative Procedure Act itself by adding to the list of named exclusions to the Act therein contained. Thus, the Veteran Emergency Housing Act of 1946 was excluded in this manner, 60 Stat. 918, 60 Stat. 993; as was the Sugar Control Extension Act of 1947, 61 Stat. 37; and the Selective Service Training Act of 1940, 61 Stat. 201; as well as the Housing and Rent Act of 1947, 61 Stat. 201.

Therefore, in view of the fact that the exclusion of the hearing provisions of the Administrative Procedure Act is only implied by language contained in the 1952 Immigration Act, and such an implied exclusion is a novel departure from the express exclusion required by the Administrative Procedure Act, the exclusion should not be broadened to cover provisions of the Administrative Procedure Act pertaining to the appointment, qualification and assignment of hearing officers, especially when said provision of the Administrative Procedure Act was not even considered by the court in the Marcello case. This is all the more true since the practice of comingling of functions in administrative agencies remains condemned

y the courts regardless of the decision in the Marcello ase. Wong Yang Sung vs. McGrath, 339 U. S. 33.

4. THE 1952 IMMIGRATION AND NATIONALITY ACT VIOLATES THE CONSTITUTION.

A. THE CONSTITUTION APPLIES TO ALIENS AS PERSONS AND DEPORTATION AS A POWER.

From the earliest date in our national history, it vas made clear that the constitution is superior and paramount law to enactments of Congress. Thus, it was stated by the Supreme Court in Marbury vs. Madison, Cranch 137, 177:

> "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."
>
> "The authority of constitutions over governments and of the sovereignty of the people over constitutions are truths which are at all times necessary to be kept in mind; and at no time like the present."

Madison's Report on the Virginia Resolution, 4 Elliott's Debates, Page 550.

Although cases have stated that the power of Congress in dealing with immigration and deportation is plenary, Galvan vs. Press, 347 U.S. 522; Harisiades vs. Shaughnessy, 342 U.S. 580; Carlson vs. Landon, 342 U.S. 524, this must of necessity be subordinate to the ultimate plenary power which lies in the people as expressed in the Constitution. Under the Constitution, only the people as a whole are sovereign and only their authority is plenary. All laws enacted by Congress are subordinate and governed by the provisions and confines of the Constitution.

Thus it has been held specifically that the Constitution applies to aliens as persons. See Bridges vs. California, 314 U.S. 252; Yick Wo vs. Hopkins, 118 U.S. 356; Bridges vs. Wixon, 326 U.S. 135, 148; Schneiderman vs. United States, 320 U.S. 118. Aliens are entitled to protection of the Fifth and Sixth Amendments in criminal proceedings, Wong Wing vs. U.S., 163 U.S. 228; they may invoke the writ of habeas corpus to protect their personal liberty, Nishimura Ekiu vs. U.S., 142 U.S. 651; they are entitled to economic opportunity, Yick Wo vs. Hopkins, 118 U.S. 356; and property cannot be taken from aliens without just compensation, Russian Volunteer Fleet vs. U.S., 282 U.S. 481.

It is equally clear that the Constitution also applies to deportation as a power. See the Japanese Immigrant case (Yamataya vs. Fisher) 189 U. S. 86; Fong Yue Ting vs. United States, 149 U. S. 698; Wong Wing vs. United States, 163 U. S. 228. The law is undisputed that the Constitutional guarantee of due process applies, at least as to the procedure in deportation proceedings, and the hearing given persons charged with deportable offenses must be fair and must abide by fundamental procedural safeguards. Kwock Jan Fat vs. White, 253 U. S. 454; Yamataya vs. Fisher, 189 U. S. 86; Kwong Hai Chew vs. Colding, 344 U. S. 590; Wong Yang Sung vs. McGrath, 339 U. S. 33; Heikkila vs. Barber, 345 U. S. 229; Johnson vs. Eisentrager, 339 U. S. 63; Bridges vs. Wixon, 326 U. S. 135; Kessler vs. Strecker, 307 U. S. 22; Shaughnessy vs. Mezei, 345 U. S. 206; Galvan vs. Press, 347 U. S. 522; Carlson vs. Landon, 342 U. S. 524; United States ex rel Vajtauer vs. Commissioner, 273 U. S. 103; United States ex rel Bilokumsky vs. Tod, 263 U. S. 149; Tang Tun vs. Edsell, 223 U. S. 673.

The parent case of the doctrine that Congress has "plenary" powers in the field of deportation is that of Fong Yue Ting vs. United States, 149 U. S. 698. This case held that the Chinese Exclusion Act of 1892 was valid and constitutional over the objections that the provisions of the Act violated the due process clause. The authority of that

case has seriously been undermined in several respects. First, the Fong case assumed the power of Congress to discriminate in deportation on the basis of race alone whereas government discrimination on the basis of race alone has recently been held to violate the Constitution. Shelley vs. Kramer, 334 U. S. 1; Barrows vs. Jackson, 346 U. S. 249; Brown vs. Board of Education, 347 U. S. 483, second opinion 349 U. S. 294; Bolling vs. Sharpe, 347 U. S. 497, second opinion 349 U. S. 294. The Fong case is further undermined as precedent because it was decided prior to the decision in the numerous cases listed above holding that aliens in deportation proceedings are entitled to procedural due process. The Fong case was antedated by Kwock Jan Fat vs. White, 253 U. S. 454, but in that case the alien claimed to be a United States citizen and it was there held that he was entitled to procedural due process.

Further, the Fong case confuses the issue of deportation with that of exclusion and also confuses and glosses over the power of a sovereign government to exclude or expel non-citizens with the limitations on that power contained in the due process clause of the Constitution. One of the sources cited by the majority opinion in the Fong case for the proposition that the government of a sovereign state has the power to exclude or expel aliens makes it clear that this power may be limited by the domestic laws of the country. "The exercise

of this right [to deport aliens] may be subjected, doubtless, to certain forms by the domestic laws of each country; but the right exists, nonetheless, universally recognized and put in force." 2 Ortolan Diplomatie de la Mer (4th Ed) Chap. 14, P. 297. The "form" of domestic law which limits the right to deport aliens in this instance is the due process clause contained in the Fifth Amendment to the Constitution.

> "It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practice of other nations to ascertain the limits? The governments of other nations have elastic powers -- ours is fixed and bounded by a written constitution. The explulsion of a race may be within the inherent powers of a despotism. History,

before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish. Banishment may be resorted to as punishment for crime; but among the powers reserved to the people and not delegated to the government is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory.

"Whatever may be true as to exclusion, and as to that see Chae Chan Ping vs. United States, 130 U. S. 581, and Ekiu vs. United States, 142 U. S. 651, I deny that there is any arbitrary and unrestrained power to banish residents even resident aliens. What, it may be asked, is the reason for any difference? The answer is obvious. The Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions. And it may be that the national government, having full control of all matters

relating to other nations, has the power to build, as it were, a Chinese wall around our borders and absolutely forbid aliens to enter. But the Constitution has potency everywhere within the limits of our territory and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument. Now, the power to remove resident aliens is, confessedly, not expressed. Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the Constitution. In the case of Monongahela Nav. Co. vs. United States, ante, p. 463, it was said: 'But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce; but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed

by this 5th Amendment, and can take only on payment of just compensation'. And if that be true of the powers expressly granted, it must as certainly be true of those that are only granted by implication." Fong Yue Ting vs. United States, 149 U.S. 738 dissenting opinion of Mr. Justice Brewer.

Appellant does not question "the government's power to terminate its hospitality", Harisiades vs. Shaughnessy, 342 U.S. 580, 587, but maintains that this power or any other power granted to the government by the Constitution must be exercised with fairness and must afford due process of law. Due process limits even the war powers, Hamilton vs. Kentucky Distilleries, 251 U.S. 146; no less does due process limit powers only impliedly granted by the Constitution.

B. THE IMMIGRATION AND NATIONALITY ACT VIOLATES DUE PROCESS IN THAT THE STATUTE NEITHER ESTABLISHES NOR IS PURSUANT TO ANY REASONABLE STANDARD, NOR IS IT RATIONAL, NOR DOES IT GIVE ADEQUATE WARNING OR HEARING RIGHTS.

The Immigration and Nationality Act establishes as a basis for deportation merely the fact of prior membership or association in a named organization, the Communist Party. This basis of deportation is established without reference to any standard of conduct or without a charge, trial or a hearing being given the named organization and is obviously an attempted exercise of arbitrary power unlimited by any reasonable standard.

In the case of Yick Wo vs. Hopkins, 118 U. S. 356, it was stated at page 369 and 370 by the Supreme Court that:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the

play and action of purely personal and arbitrary power . . . But the fundamental rights of life, liberty and the pursuit of happiness considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the glorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws, and not of men'. For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

It is immaterial that the arbitrary attempt to exercise the power in the instant case is asserted by Congress. Thomas Jefferson, in his Notes on the State of Virginia, page 195, has stated:

"It will be no alleviation, that these powers will be executed by a plurality of

hands, and not by a single one. One Hundred and seventy-three despots would surely be as oppressive as one. As little will it avail us, that they are chosen by ourselves. An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the power of government should be so divided and balanced among several bodies of magistracy, as that no one could ever transcend their legal limits."

And as has been said by Mr. Justice Douglas, concurring in Joint Anti-Fascist Refugee Committee vs. McGrath, 341 U. S. 123, 177:

> "It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws not of men."

Under our constitution nothing can be law which "is purely arbitrary and acknowledges neither guidance nor restraint". Yick Wo vs. Hopkins, Supra, at page 367. Accord: Musser vs. Utah, 333 U. S. 95, 97.

Stated another way, law in our system "cannot be arbitrary fiat" but rather "must be the result of a process of reasoning . . . This is inherent in the meaning of 'determination'. It is implicit in a government of laws and

not of men." Joint Anti-Fascist Refugee Committee vs. McGrath, 341 U. S. 123, 136.

Law without reason offends the most elementary concept of ordered society and a law without standard also offends elementary concepts of society.

> "No reason for it is shown, and a conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong . . . The imprisonment of the petitioners is therefore illegal and they must be discharged." Yick Wo vs. Hopkins, 118 U. S. 356, 374.

A law which is "irrational" is therefore unconstitutional and no law at all. Perez vs. Sharp, 32 Cal (2d) 711, 713. Under our Constitution law may not depart from reason. Pot vs. United States, 319 U. S. 463; Morrison vs. California, 291 U. S. 82; Bailey vs. Alabama, 219 U. S. 219; Prentis vs. Atlantic Coast Supply & Company, 211 U. S. 210, 226; and Opp Cotton Mills vs. Administrator, 312 U. S. 126, 145.

> "Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property." Western and Atlantic Railroad vs. Henderson, 279 U. S. 639, 642.

"it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." McFarland vs. American Sugar Company, 241 U.S. 79, 86.

Thus statutes have been held "void for vagueness" United Stated vs. Cohen Grocery Company, 255 U.S. 81; Lanzetta vs. New Jersey, 306 U.S. 451; A. B. Small Company vs. American Sugar Refining Company, 267 U.S. 233. The rule of these cases that overly vague standards are void standards under the Constitution is not confined to criminal prosecution only.

"The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful, or stripping a participant of his rights under it, was equally within the principle of those cases." A. B. Small Company vs. American Sugar Refining Company, Supra,

Page 239.

The Supreme Court has said that to penalize or convict a man "upon a charge not made would be sure denial of due process". Dejonge vs. Oregon, 299 U. S. 353, 362. The statute which penalizes and convicts on a charge never formulated in the law offends the fundamentals of due process even more violently.

The statute at bar condemns membership in an organization without any hearing whatever for the organization. True, the individual is afforded a hearing to ascertain whether or not he was a member of such organization, but the assumption that membership in said organization is deportable nowhere receives a hearing.

It is fundamental in the law that as to the most humble matter of right, interest, liability or property, any and all men are entitled of right to a hearing before being adjudged liable and accountable under any law. Under law every threatened or affected man "is entitled, upon the most fundamental principles, to a day in court". Coe vs. Armour Fertilizer Works, 237 U. S. 413, 423.

This principle also is not limited to criminal areas but applies to civil matters as well, and particularly where penalties, forfeitures or intrusions upon liberty are entailed.

"Notice and opportunity to be heard are fundamental to due process of law. We

would reverse these cases out of hand if they were suits of a civil nature to establish a claim against petitioners. Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil. See Coe vs. Armour Fertilizer Works, 237 U. S. 413, 424, 59 Law. Ed. 288, 298, 58 S.Ct. 149; Re: Oliver 333 U. S. 257, 273, 92 Law. Ed. 682, 694, 68 S. Ct. 499." Joint Anti-Fascist Refugee Committee vs. McGrath, 341 U. S. 123, 178, Mr. Justice Douglas concurring.

"Are these acts of the legislature which effect only particular persons, and their particular privileges, laws of the land? Let this question be answered by the text of Blackstone, and first: It (the law) is a rule, not a transient sudden order from a superior to or concerning a particular person, but something permanent, uniform and universal; therefore, a particular act of the legislature to confiscate the goods of Titius or to attaint him of high treason, does not enter into the idea of a municipal law, for the operation of this act is spent upon Titius only, and has no relation to the community in general . . . By

the law of the land is most clearly indicated the general law -- a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of enactment is not therefore to be considered the law of the land. If this was so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance inoperative and void. It would tend to establish the union of all powers in the Legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony; judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country."

5 Webster's Works 487, set forth in full in

Dartmouth College vs. Woodworth, 17 U. S. 250, 278-9, 4 Wheat 517, 580-2.

Legislation affecting particular individuals or groups by name was described in In Re Campbell, 64 Cal App 300, 302, as "so far afield of any reasonable conception of the exercise of legislative power of this country, as it is defined, qualified, and limited by our constitutions, that the specific ground upon which or reason for which its invalidity is to be declared is of no material consequence".

And as was stated by the Supreme Court of California in Communist Party vs. Peek, 20 Cal (2d) 536 at Page 549:

> "For example, it is clearly within the power of the legislature to determine as a fact that, in the public interest, all diseased cattle should be destroyed, but it is not within the legislative power to determine that John Smith's cattle are diseased."

And as was said by Mr. Justice Brewer in his dissent in Fong Yue Ting vs. U. S., 149 U. S. 698, 742:

> "It is true this statute is directed only against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised tomorrow against other classes and other people? If the guaranties of these Amendments can be thus ignored,

in order to get rid of this distasteful class, what security have others that a like disregard of its provisions may not be resorted to?"

C. THE STATUTE AT BAR IS UNCONSTITUTIONAL AS A BILL OF ATTAINDER AND AN EX POST FACTO LAW.

In naming the Communist Party, and listing membership in the Communist Party prior to the date of the law's enactment, as a ground for the penalty of deportation, the statute involved constitutes a bill of attainder and an ex post facto law. Although it has been said that deportation is not criminal and therefore the bill of attainder and ex post facto provisions of the Constitution do not apply, what is required to render applicable these protective guarantees of the Constitution is punishment, not criminality. Conceded by the cases is the fact that imposition of some civil penalties may be sufficiently punishing in purpose and effect as to lie within the protected area of immunity. See Cummings vs. Missouri, 4 Wall 277; Ex Parte Garland, 4 Wall 333; United States vs. Lovett, 328 U.S. 303 (disqualification from professions); Pierce vs. Carskadon, 16 Wall 234 (denial of access to the courts); Burgess vs. Sammon,

)7 U. S. 381 (exaction of tax); and Fletcher vs. Peck, 6 Cranch 87 (seizure of property).

Although deportation cases are civil in form, deportation may be as severe a punishment as loss of livelihood. Bridges vs. Wixon, 326 U. S. 135, 154. It may "deprive a man of all that makes life worth living", Ng Fung Ho vs. White, 259 U. S. 276, 284; and "deportation is a drastic measure and at times the equivalent of banishment or exile". Fong Haw Tan vs. Phelan, 333 U. S. 6, 10.

Although "deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure", Harisiades vs. Shaughnessy, 342 U. S. 580, 594, the courts, nevertheless, have held that because of the drastic consequences of deportation substantially the same due process standards that apply in criminal cases should also apply in deportation cases. Jordan vs. DeGeorge, 341 U. S. 223; Bridges vs. Wixon, 326 U. S. 135; Fong Haw Tan vs. Phelan, 333 U. S. 6.

The test for the application of ex post facto and bill of attainder prohibitions established by the decisions is whether the statute creates an impersonal qualification of privilege or imposes a penalty with an eye to compliance with rules of conduct.

Thus in Hawker vs. New York, 170 U. S. 189, at 198,

ıe court stated:

> "It was held that, as many of the matters provided for in these oaths, had no relation to the fitness or qualification of the two parties, the one to follow the profession of a minister of the gospel and the other to act as an attorney and counselor, the oaths should be considered, not legitimate tests of qualifications, but in the nature of penalties for past offenses."

In Dent vs. West Virginia, 129 U.S. 114, at 126, ıe court said: "As many of the acts from which the arties were obliged to purge themselves by the oath had) relation to their fitness for the pursuits of the profession esignated, the court held that the oath was not required as means of ascertaining whether the parties were qualified or those pursuits and professions, but were enacted ecause it was thought that the act deserved punishment nd that there was no way of inflicting punishment except y depriving the parties of their offices and trusts."

The statute at bar clearly involves punishment and ıe concept of moral conduct and individual responsibility nd cannot be compared to a judgment of purely impersonal isability. Implicit in the membership in the proscribed rganization is the judgment of supposed advocacy of or elief in the overthrow of the government by force and

violence. Membership without such imputed individual culpability and responsibility would, as to any organization, be pointless in relation to a deportation order. Hence are applicable the Constitutional guarantees against bills of attainder and ex post facto laws.

The statute, in that it imposes penalty by name alone, also is similar to the lettre de cachet used in the French Monarchy prior to the French Revolution.

> "The lettre de cachet was an order of the king that one of his subjects be forthwith imprisoned or exiled without a trial or an opportunity to defend himself. In the 18th Century they were often issued in blank to local police. Louis XV is supposed to have issued more than 150,000 lettres de cachet during his reign. This device was the principal means employed to prosecute crimes of opinion, although it was also used by the royalty as a convenient method of preventing the public airing of intra-family scandals. Voltaire, Mirabeau and Montesque, among others, denounced the use of the lettre de cachet and it was abolished after the French Revolution, though later temporarily revived by Napoleon." In Re Oliver, 333 U. S.

257, 269, citing 13 Encyclopedia Britannica 971; 3 Encyclopedia Social Science 137.

To apply a statute adopted in 1952 to appellant, whose alleged membership in the Communist Party occurred some years before is to enforce an ex post facto law and bill of attainder against the appellant. A similar argument, it is true, was rejected in Harisiades vs. Shaughnessy, 340 U. S. 580 and this rejection was not departed from in Galvan vs. Press, 347 U. S. 522, and Marcello vs. Bonds, 349 U. S. 302, but in Harisiades the retroactive basis for deportation was voluntary membership in an organization advocating violence, conduct long proscribed by criminal law, while the statute at bar provides that membership in a named organization be the basis for deportation. At the time this statute was enacted, membership in the Communist Party had not been made illegal. To the contrary, the Supreme Court had said as recently as June 21, 1943 in Schneiderman vs. U. S., 320 U. S. 118, 157:

> "A tenable conclusion from the foregoing is that the Party desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted counter-overthrow once the Party had obtained control in a peaceful

manner, or as a method of last resort to enforce a majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open."

The statute here is a legislative enactment aimed t punishment of a proscribed class. Because of its etroactive effect, it constitutes an unconstitutional ex post acto law as well as a bill of attainder. Were it not for the act that "the slate is not clean", "it might fairly be said lso that the ex post facto Clause, even though applicable nly to punitive legislation, should be applied to deportaion". Galvan vs. Press, 347 U.S. 522, 531. But the bsence of a "clean slate" has not prevented the courts rom righting an error in the proper case, even though ver-ruling many years of precedent.

"In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy vs. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation." Brown vs. Board of Education, 347 U.S. 483, 492.

"If only a question of statutory

construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a Century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so." Erie R. Co. vs. Tompkins, 304 U. S. 64, 77.

Equally compelling should be the abandonment of the unconstitutional doctrine that the implied power of deportation transcends the express substantive provisions of due process.

D. THE STATUTE AT BAR VIOLATES FREEDOM OF SPEECH AND ASSOCIATION.

Membership alone in an organization is made a ground for deportation by the instant statute. Scienter and individual understanding are disregarded. Not only is the record naked of any evidence concerning individual culpability or of organizational wrong-doing but government witness Rosser testified that he and appellant "worked together in the unemployed movement on demonstrations, grievance committees, delegations to the relief headquarters of the State, of the County, we

went to all types of sections of the County, Belvedere, Inglewood, problems and so the only thing I saw him doing was working daily in the unemployed movement". (S. R. 28)

> "We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose although called by that Party. The defendant was nonetheless entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty." DeJonge vs. Oregon, 299 U. S. 353, 365-366.

To impose a penalty and a disability upon members of an organization without any regard to individual action not only obviously abridges freedom of speech and association but also punishes, by deportation in the instant case, the exercise of the most fundamental constitutional rights necessary if the market place of ideas is to remain open.

> "The greater the importance of

safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."
DeJonge vs. Oregon, 299 U. S. 353, 365.

CONCLUSION

Because of the numerous constitutional prohibitions violated by the 1952 Immigration and Naturalization Statute and the fact that the charge against appellant was not supported by reasonable, substantial and probative evidence, nor was appellant afforded the type of hearing required by law, the decision below should be reversed and appellee should be restrained from deporting appellant.

Respectfully submitted,

IRWIN GOSTIN

Attorney for Appellant